

## 2012 R.I. AG LEXIS 35

Office of the Attorney General of the State of Rhode Island

### Reporter

2012 R.I. AG LEXIS 35 \*

### No. PR 12-25

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September 13, 2012

### Core Terms

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exempt, police officer, dare, public record, island, redact, disclosure, civilian, public disclosure, business day, law enforcement agency, rake, public body, confidential, scene

### Syllabus

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[\*1]

Newport Daily News v. Rhode Island Department of Public Safety

**Request By:** Ms. Sheila L. Mallowney

**Opinion By:** Maria R. Corvese, Special Assistant Attorney General

### Opinion

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The investigation into your Access to Public Records Act ("APRA") complaint filed against the Department of Public Safety ("DPS") is complete. By email correspondence dated March 13, 2012, you alleged the DPS violated the APRA when it failed to respond to your February 20, 2012 APRA request on behalf of the Newport Daily News. You further alleged that the records sought, specifically the names of the three police officers who reported to the scene of an incident on February 3, 2012, as well as the 911 recording from that incident, are public records under the APRA. It should be noted that the incident responded to culminated in the death of the subject.

We received a substantive response to your complaint from Lisa S. Holley, Chief Legal Counsel for the DPS. Ms. Holley states, in pertinent part:

4. On February 21, 2012, on or about 8:51:42 am, Sheila L. Mallowney, Executive Editor, the Newport Daily News, emailed Lieutenant Colonel Raymond Studley requesting 'the names of the three Portsmouth police officers who responded to the scene to [\*2] 100 Almeida Terrace.' Additionally, Ms. Mallowney requested a 'recording of the 911 call[.]'

5. While researching Ms. Mallowney's inquiry, I queried the **Rhode Island** State Police Records Management System ('RMS') and determined that the matter was an active and ongoing investigation into the Portsmouth **Rhode Island** Police in-custody death.

6. I further determined that the information requested was in fact not contained in a report 'REFLECTING THE INTIAL ARREST OF AN ADULT AND THE CHARGE OR CHARGES BROUGHT AGAINST AN ADULT, ' but that an offense report which had not yet resulted in the filing of criminal charges was in draft format.

7. On February 24, 2012, I responded in writing to Ms. Mallowney, at the address provided in her email...[.]

8. I personally placed the responsive letter in the 'outgoing mail' bin at Department of Public Safety/**Rhode Island** State Police Headquarters on February 24, 2012.

9. In the written correspondence to Ms. Mallowney, I denied her request based on [RIGL Section 38-2-2](#), which excludes personal information relating to an individual in any files and law enforcement records that could reasonably be expected [\*3] to be an unwarranted invasion of personal privacy, or could disclose information furnished on a confidential basis.

At the outset, we note that in examining whether a violation of the APRA has occurred, we are mindful that our mandate is not to substitute this Department's independent judgment concerning whether an infraction has occurred, but instead, to interpret and enforce the APRA as the **General** Assembly has written this law and as the **Rhode Island** Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the DPS violated the APRA. See [R.I. Gen. Laws § 38-2-8](#). In other words, we do not write on a blank slate.

I. The DPS did not violate [R.I. Gen. Laws § 38-2-7](#) because the DPS responded within ten (10) business days of the request with specific reasons for the denial.

Under the APRA, a public body has ten (10) business days to respond to a request for documents. See [R.I. Gen. Laws § 38-2-7](#). If the public body denies the request, a written response detailing the specific reasons for the denial shall be [\*4] sent within those ten (10) business days to the person or entity making the request. See [R.I. Gen. Laws § 38-2-7\(a\)](#). If no response is sent within ten (10) business days, the lack of response will be deemed a denial. See [R.I. Gen. Laws § 38-2-7\(b\)](#). If, for good cause, the public body cannot comply with a records request within ten (10) business days, then the public body may extend the period an additional twenty (20) business days. See id.

In your complaint, you alleged that you never received any response to your APRA request from the DPS. In response to your complaint, Ms. Holley stated in an affidavit that she responded in writing to you on February 24, 2012, denying your request pursuant to, inter alia, [R.I. Gen. Laws § 38-2-2\(5\)\(i\)\(D\)](#). Ms. Holley also provided this Department with a copy of a letter addressed to you dated February 24, 2012. Having received no evidence from you to contradict the veracity of Ms. Holley's assertion, and based upon our review of the submitted denial letter, this Department finds that the DPS responded within ten (10) business days [\*5] of the request and provided specific reasons for the denial as required under [R.I. Gen. Laws § 38-2-7\(a\)](#). Thus, the DPS did not violate the APRA.

II. The DPS did not violate the APRA when the DPS withheld the names of the police officers and the **911** recording.

a. The names of the three Portsmouth police officers on scene are not public records under the APRA.

Here, we begin by defining your APRA request. In particular, you do not seek access to a particular document, but instead seek the names of the three (3) Portsmouth police officers who responded to the scene. Obviously, this information is maintained within various police-related documents.

Under the APRA, a record is public unless it falls within one of several enumerated exceptions or the balancing test. See [R.I. Gen. Laws § 38-2-2\(5\)\(i\)\(A\)](#)-(Y); see also [Direct Action for Rights and Equality vs. Gannon, 713 A.2d 218 \(R.I. 1998\)](#). All records maintained by law enforcement agencies are public unless one of six (6) sub-exceptions apply. See [R.I. Gen. Laws § 38-2-2\(5\)\(i\)\(D\)\(a\)](#)-(f). **[\*6]** Specifically, the APRA exempts from disclosure:

"[a]ll records maintained by law enforcement agencies for criminal law enforcement and all records relating to the detection and investigation of crime, including those maintained on any individual or compiled in the course of a criminal investigation by any law enforcement agency. Provided, however, such records shall not be deemed public only to the extent that the disclosure of the records or information (a) could reasonably be expected to interfere with investigations of criminal activity or with enforcement proceedings...[.]" [R.I. Gen. Laws § 38-2-2\(5\)\(i\)\(D\)](#).

The APRA also exempts "[a]ll records which are identifiable to an individual applicant for benefits, client, patient, student, or employee...[.]" [R.I. Gen. Laws § 38-2-2\(5\)\(i\)\(A\)\(I\)](#).<sup>1</sup>

Consistent with the above exemptions, the **Rhode Island** Supreme Court has held that names of police officers may be redacted and are exempt from public disclosure even when the rest of the record is public. See [DARE, 713 A.2d 218 \(R.I. 1998\)](#); **[\*7]** [The Rake vs. Gorodetsky, 452 A.2d 1144 \(R.I. 1982\)](#). In *The Rake*, Brown University students sought Providence police department records regarding civilian complaints of police misconduct. There, the City claimed the requested documents were exempt from disclosure in the entirety pursuant to what was enumerated as [R.I. Gen. Laws § 38-2-2\(5\)\(i\)\(A\)\(I\)](#) because the requested reports contained the names and identities of police officers. The Court, on the other hand, agreed that the documents be redacted to remove the identities of the complainants and the police officers, and thus suggested that as redacted, the responsive documents were public records. On appeal, the **Rhode Island** Supreme Court concluded that the requested civilian complaints must be publicly disclosed, but in redacted form. The Supreme Court explained:

"[t]he statute requires that the records must be identifiable to an individual applicant in order for the exemption to take effect. In the present case, the reports do not identify the citizen complainants or the police officers because the names of both have been deleted as ordered by the Superior Court **[\*8]** justice. Consequently, an important prerequisite for application of the exception has not been met." [The Rake, 452 A.2d at 1148](#) (emphasis added).

Accordingly, *The Rake* stands for authority that certain police records, i.e., civilian complaints, are public records after information identifying named police officers is redacted and that the names of police officers fall within the purview of what was enumerated as [R.I. Gen. Laws § 38-2-2\(5\)\(i\)\(A\)\(I\)](#).

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<sup>1</sup> Effective September 1, 2012, this exemption has been eliminated from the APRA. Nevertheless, because we are reviewing the response from the DPS, our review must consider the APRA in effect at the time of denial. See [Bonner v. United States Department of State, 928 F.2d 1148, 1152 \(D.C. Cir. 1991\)](#) (R.B. Ginsburg, J.) ("Courts reviewing an agency's action must of necessity limit the scope of their inquiry to an appropriate time frame. In FOIA cases particularly, court review properly focuses on the time the determination to withhold is made \*\*\* [t]o require an agency to adjust or modify its FOIA responses based on post response occurrences could create an endless cycle of judicially mandated reprocessing.").

The Court revisited this issue in DARE, overturning a decision by the trial court to release records regarding civilian complaints in unredacted form. See [DARE, 713 A.2d at 225](#). In DARE, a community-action group, Direct Action for Rights and Equality ("DARE"), made an APRA request to the Providence Police Department seeking records pertaining to civilian complaints of police misconduct, which included the name of the person filing the complaint and the name of the officer who was the subject of the complaint. See [id. at 218](#). The records sought were:

- a.) "Every 'Providence Police Civilian Complaint report'...filed within [\*9] the Providence Police Dept. from 1986 to present.
- b.) A listing of all findings from investigations that was [sic] conducted by the Bureau of Internal Affairs, in reference to all 'Providence Police Civilian Complaint reports' on record from 1986 to present.
- c.) All reports made by the 'Providence Police Department Hearing officers [] on their [sic] decisions [sic] from the findings of investigations conducted in Re: Providence Police Civilian Complaints'...from 1986 to present.
- d.) Reports on all disciplinary action that's [sic] been taken as a result of recommendations made by the Hearing Officers [] Division since 1986 to present."

See [id. at 220](#).

The trial justice concluded that documents relating to the above categories were public records and that the requested documents must be disclosed in unredacted form, i.e., with the names of the complaints and officers included. See [id. at 221](#). The Supreme Court disagreed and concluded that documents relating to category (b) were exempt from public disclosure (based upon the determination that the requested documents did not exist) and, similar to its reasoning in *The Rake*, documents relating [\*10] to categories (a), (c), and (d) were public records, but the names of the complainants and the officers could be redacted. See [id. at 225](#).

Specifically, the Supreme Court in DARE examined its past precedent and stated that "a rule has evolved that permits the disclosure of records that do not specifically identify individuals and that represent final action." See [id. at 224](#) (emphasis added). As noted earlier, your APRA request expressly seeks the identity of the three (3) officers who responded to a particular incident. It may also be of some import to note that in DARE, the Supreme Court explained that "the trial justice's determination that because of a police officer's public duty he or she has no reasonable expectation of privacy, although well intentioned, was error." <sup>2</sup> See [id. at 225](#).

While the above supports our conclusion in this case that the names of the police officers who responded to this incident are exempt from public disclosure pursuant to [R.I. Gen. Laws § 38-2-2\(5\)\(i\)\(A\)\(I\)](#) and [\*11] ***Rhode Island*** Supreme Court precedent, the Supreme Court's discussion in DARE adds additional support to our conclusion. Specifically, with respect to category (d), the Court concluded that these documents fell within the clause that "[r]ecords relating to management and direction of a law enforcement agency and records or reports reflecting the initial arrest of an adult and the charge or charges brought against an adult shall be public." See [id. at 224](#) (emphasis added); see

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<sup>2</sup> This is consistent with [R.I. Gen. Laws § 38-2-2\(5\)\(i\)\(A\)\(I\)](#), which exempted from disclosure records identifiable to an individual employee. As of September 1, 2012, this exemption is struck in favor of a balancing test, where the standard is whether the disclosure of requested records "would constitute a clearly unwarranted invasion of personal privacy[.]" See [R.I. Gen. Laws § 38-2-2\(4\)\(A\)\(I\)\(b\)](#). Since this new law was not applicable at the time of your request or the time of the denial, we do not examine your APRA request under this balancing test. We express no opinion on the legal standard applicable to documents that exist prior to September 1, 2012, but which are requested after September 1, 2012.

also [R.I. Gen. Laws § 38-2-2\(5\)\(i\)\(D\)](#). Notwithstanding this conclusion, and despite the plain language mandating that documents that fell within this clause "shall be public," the Supreme Court related that the documents responsive to category (d) could nonetheless be redacted to remove the identities of the complainants and the officers involved. See DARE at 225 ("although the city has no duty to create the records requested in category (d), to the extent that these reports exist and reflect final action, these documents must also be disclosed upon request in redacted form.") (emphasis added). This precedent further supports our conclusion that [\*12] even documents that fall within this clause may be redacted consistent with past precedent.

In the instant matter, although you do not specify a particular document you are seeking, you do make clear that you are requesting the names of the three police officers who reported to the scene of an incident on February 3, 2012. As made clear by The Rake and DARE, as well as by the plain language of your request, the information you have requested is identifiable to an individual, and therefore is exempt from public disclosure. This conclusion is also supported by [Robinson v. Malinoff, 770 A.2d 873, 877 \(R.I. 2001\)](#), another case involving the Newport Daily News where it requested all investigation records pertaining to a specific Newport Police Department officer, Officer Robinson. In Robinson, the Supreme Court made clear that [R.I. Gen. Laws § 38-2-2\(5\)\(i\)\(A\)\(I\)](#) "expresses the Legislature's clearly stated intention to exempt from public disclosure those records concerning a particular and identifiable individual." See also [Providence Journal v. Sundlun, 616 A.2d 1131, 1135 \(R.I. 1992\)](#) ("It should [\*13] be noted, however, that although the legislative intent may have been to protect against the release of personal or confidential information, it implemented this intention by prohibiting the release of all records that would be identifiable to an individual person, whether or not such records might in another context be construed as either personal or confidential. "); [Pawtucket Teachers Alliance v. Brady, 556 A.2d 556, 559 \(R.I. 1989\)](#) ("Even if all references to proper names were deleted, the principal's identity would still be abundantly clear from the entire context of the report."). Providing the names of the police officers involved, as you requested, would contravene the precedent set forth by the **Rhode Island** Supreme Court and for this reason, the DPS did not violate the APRA when it denied your request pursuant to [R.I. Gen. Laws § 38-2-2\(5\)\(i\)\(A\)\(I\)](#).<sup>3</sup>

b. The **911** recording is not a public record pursuant to [R.I. Gen. Laws § 39-21.1-17](#).

Under [R.I. Gen. Laws § 39-21.1-17](#) [\*14], entitled "The Emergency **911** Telephone Number Act," **911** recordings are confidential and not public records. Specifically, this provision provides:

"All telephone calls and telephone call transmissions received pursuant to this chapter and all tapes containing records of telephone calls shall remain confidential and used only for the purpose of handling emergency calls and for public safety purposes as may be needed for law enforcement, fire, medical, rescue or other emergency services. The calls shall not be released to any other parties without the

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<sup>3</sup> We are aware that many law enforcement agencies routinely provide the names of responding officers, but our responsibility is not to review this past practice, but instead to review this specific case. In this vein, it is also important to note that even if a requested document is exempt from public disclosure, a public body may provide access to this exempted record. For this reason, the past practice of providing officer-related information has no bearing on the legal issue presented in this case. Any past practice has also demonstrated that law enforcement agencies have not always provided information identifiable to individual officers and this action has been upheld by the **Rhode Island** Supreme Court. See [Robinson, 770 A.2d 873](#) (investigation records relating to Officer Robinson were exempt from disclosure). It should also be noted that our finding has limited application to future requests. As made clear herein, our finding is based upon [R.I. Gen. Laws § 38-2-2\(5\)\(i\)\(A\)\(I\)](#), which was applicable at the time of your request and at the time of the denial. This language has been amended and seemingly could not serve as the basis for a denial of records created after September 1, 2012.

written consent of the caller whose voice is recorded, or upon order of the court." [R.I. Gen. Laws § 39-21.1-17](#) (emphases added).

The plain language of [R.I. Gen. Laws § 39-21.1-17](#) prohibits the disclosure of **911** tapes. See [The Providence Journal Co. v. Town of West Warwick, 2004 WL 1770102 \(R.I. Super. 2004\)](#) (Pfeiffer, J.)(**911** tapes exempt from public disclosure) . Thus, the DPS did not violate the APRA by denying this aspect of your request.

Although the **Attorney General** will not file suit in this matter, nothing within [\*15] the APRA prohibits an individual from obtaining legal counsel for the purpose of instituting injunctive or declaratory relief in superior court. See [R.I. Gen. Laws § 38-2-8\(b\)](#). Please be advised that we are closing your file as of the date of this letter.

**Load Date:** 2014-09-26

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